Supreme Court, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1823

L. B. McFARLAND, *Petitioner,*

v.

STATE OF GEORGIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1.

Did the affidavit for the search warrant establish probable cause?

STATEMENT OF THE CASE

Petitioner was arrested and charged with keeping a gambling place, a misdemeanor.

A Motion to Suppress was filed by Petitioner based, on the

alleged failure of the State to show probable cause. Petitioner alleged that the affidavit was based solely on information obtained from an informer and did not contain any independent corroboration of the informant's conclusions. After a hearing, the Motion was denied.

Petitioner was tried and convicted. Petitioner was subsequently sentenced to twelve months, a $5,000.00 fine and payment of cost.

Petitioner appealed his conviction to the Georgia Court of Appeals, and his conviction was affirmed. *See McFarland v. State*, 137 Ga. App. 354, (Southeastern citation not available). Motion for rehearing was filed and denied, and Petitioner applied for certiorari in the Georgia Supreme Court. The Georgia Supreme Court denied the Writ of Certiorari.

REASONS FOR NOT GRANTING THE WRIT

A. THE PETITION FOR WRIT OF CERTIORARI IS NOT OF SUCH AN EXTRAORDINARY NATURE THAT IT REQUIRES THIS COURT TO ISSUE SUCH A WRIT.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and controlling reasons therefor." Rule 19, Revised Rules of the Supreme Court of the United States (1970). This Court generally grants certiorari from a state court decision under the following circumstances: (1) if the state court has decided a federal question of substance not previously determined by this Court or (2) if the state court has decided a case in a way not in accord with applicable decisions of this Court. *See* Rule 19, Revised Rules of the Supreme Court of the United States (1970).

Petitioner's question for review presents no substantial federal question not previously determined by this Court, and the state court decision is fully in accord with the applicable decisions of this Court. The Georgia Court of Appeals fully considered the question presented here on direct appeal, and the Georgia Supreme Court denied certiorari.

B. AFFIDAVIT SHOWED FACTUAL BASIS FOR ISSUANCE OF THE SEARCH WARRANT HEREIN.

Petitioner contends that the affidavit is defective in that it does not meet or satisfy the second prong of *Aguilar—Spinelli*. This is a reference to the case of *Aguilar v. Texas*, 378 U.S. 108 (84 SCt 1509, 12 LE2d 723) and *Spinelli v. U.S.* 393 U.S. 410 (89 SCt 584, 21 LE2d 637). This Court stated in both of these cases that the affidavit upon which a search warrant is issued based on an informer's tip must (1) give reasons for the informer's reliability, and (2) that the affidavit either specifically state how the informer obtained the information or the tip describes the criminal activity in such detail that the magistrate may know it is more than a "casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Petitioner contends that the second test has not been met.

In *Spinelli* the affidavit was only a bald statement that the FBI "has been informed by a confidential reliable informant that Wm. Spinelli is operating a handbook and accepting wages and disseminating wagering information by means of the telephone..." There is a vast difference between this and the affidavit in the present case. Here the affidavit is detailed as to time and place. Also, the affidavit is corroborated by the extensive independent investigation of the GBI.

The Georgia Court of Appeals discussed the affidavit in

detail in Division 3 of its decision and concludes that the informer's tip and the independent investigation of the affiant, Agent Garner, established probable cause.

The independent investigation of the GBI was reliable information to detail the criminal activity here. In *U.S. v. Ventresca*, 380 U.S. 102, 13LEd2d 684, 85 SCt 741, this Court held observations of fellow officers engaged in a common investigation are a reliable basis for a warrant.

The Petitioner also asserts that the affidavit shows no criminal activity on the part of McFarland. Here again, this Court's decision in *U.S. v. Ventresca*, supra, clearly holds that there is a large difference between guilt and probable cause for the issuance of a search warrant and probable cause means less than evidence which would justify conviction. Here the evidence may have shown innocent activity, but considering all the related information it does show the probability or reasonable certainty of criminal activity. This point was also detailed in the Georgia Court of Appeals decision.

The test of the *Aguilar-Spinelli* decision was met, and was not overlooked by affiant, the issuing magistrate, the trial judge, or the Georgia Court of Appeals.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reason for review or error by the Georgia Court of Appeals has been set forth by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, GEORGE T. TALLEY, Attorney of Record for the respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of the foregoing Brief for the Respondent in Opposition upon the petition by depositing a copy of same in the United States mail, with proper address and adequate postage thereon to:

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This 13 day of July, 1976.

/s/ GEORGE T. TALLEY
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